No. 17-333

# In The
# Supreme Court of the United States

O. JOHN BENISEK, *et al.*,

*Appellants,*

v.

LINDA H. LAMONE, *et al.*,

*Appellees.*

**On Appeal From The United States District Court for The District of Maryland**

## BRIEF OF APPELLEES


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FEBRUARY 2018


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## QUESTIONS PRESENTED

1. Is the partisan gerrymandering claim proposed by plaintiffs and articulated by the three-judge district court unmanageable and therefore non-justiciable?

2. Did the three-judge district court act within its discretion when it denied plaintiffs' request to preliminarily enjoin Maryland's 2011 congressional redistricting law because the plaintiffs failed to provide sufficient evidence that the redistricting caused them any injury?

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## BRIEF OF APPELLEES

Contrary to the plaintiffs' claims, Maryland's 2011 congressional districting map was not imposed on voters by "backroom" deal making, Appellants' Br. 8, but was approved at referendum by an overwhelming majority of Maryland voters, including majorities in 10 of 12 counties where registered Republicans outnumber Democrats. In the newly competitive Sixth Congressional District, at issue here, voters elected a moderate Democrat in 2012, J.A. 862; J.A. 43, 45-46, 80-81, as they had many times before, J.A. 655.

Before 1991, Democrats outnumbered Republicans in Maryland's Sixth Congressional District; then, in 1991, the Maryland General Assembly adopted a districting map that gave Republicans the registration advantage. J.A. 656 ¶ 13, 14. Maryland's 2011 congressional redistricting map gave neither major political party a strong advantage in the Sixth District; instead, the 2011 map made the Sixth District competitive for both parties.

Even though the 2011 map returned the District to a political and geographic configuration consistent with the District's history over the majority of the 20th century, the plaintiffs now assert that the 2011 map retaliates against them for their successful support of Republican candidates in the Sixth District between 1992 and 2011. But it is plain that the plaintiffs' First Amendment retaliation claim does no more than arbitrarily perpetuate the status quo ante, and thereby imposes a standard under which no redistricting plan

could be assured of surviving scrutiny. The plaintiffs' novel application of First Amendment jurisprudence, which would condemn a competitive congressional district as an impermissible partisan gerrymander, thus fails to resolve the essential problem of determining when the inherently political redistricting process has gone "too far."

## STATEMENT

While relying heavily on untested factual assertions,[1] the plaintiffs ignore the history of Maryland's current Sixth District, other than to note that their preferred candidate, Roscoe Bartlett, "had represented the district since 1991." Appellants' Br. 1. They ignore

[1] In this interlocutory appeal, the three-judge court's decision denying a preliminary injunction rendered only fourteen preliminary findings of fact, all purporting to address only one of the three elements of plaintiffs' First Amendment retaliation claim. J.S. App. 18a-21a. The reliable evidentiary record thus consists only of (1) the parties' stipulations, J.A. 654; (2) the contemporary public records surrounding the legislative redistricting process, *e.g.*, J.A. 1047-51; and (3) the historical configuration of what is now the Sixth District and the history of its electoral outcomes. Basic factual and evidentiary disputes have yet to be resolved by the trier of fact, including (1) the sequence and timing of the plan's drafting; (2) the motivations of decision-makers; (3) what effects of the plan can be attributed to which motivation; and (4) the admissibility of certain evidence. To the extent the plaintiffs' brief relies on these disputed materials—even when referenced in the dissenting judge's recitation of facts, *see* Appellants' Br. 8, 17, 20—their assertions represent, at best, one side of disagreements not yet resolved by the trial court and, therefore, not yet ripe for appellate review.

the multiple considerations that lawmakers assessed in developing the 2011 map in its entirety and insist that by focusing their challenge on a single district, they can "avoid[] possible complications," *id.* at 28, posed by the undeniable fact that decisions made about other districts affected the configuration of the Sixth. Such a blinkered approach to redistricting analysis contradicts this Court's precedent.[2]

**Political and Geographical Composition of the Sixth District**

1. Before the 1991 redistricting, Democrats outnumbered Republicans in the Sixth District, but the 1991 redistricting gave Republicans the registration advantage. J.A. 656 ¶ 13, 14.

The 2011 plan left the Sixth District's political composition similar to its makeup prior to the 1991 redistricting plan:

| Sixth District Registered Voters (by percentage of district's total registered voters) | |
|---|---|
| August 1990 | 46.05% Democratic |
| October 2012 | 44.11% Democratic |

[2] *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915-16 (1995) (explaining that courts "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus"); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 409 (2006) (commending three-judge court's "knowledge of the State's people, history, and geography").

J.A. 666 ¶ 53, J.A. 656 ¶ 13. Under the 2011 districting plan, the Sixth District is a competitive district. J.A. 861, 881, 887, 1132.

Since 1911, the Sixth District has switched between Republican and Democratic representatives. J.A. 655 ¶ 7. Currently, a moderate Democrat represents the Sixth District. J.A. 862. Congressman John Delaney, who self-financed his campaign, defeated the more-liberal State Senator Robert Garagiola in the 2012 primary election. J.A. 43, 45-46, 80-81. The election of a moderate Democrat is a return to form for the Sixth District, which, from 1971 to 1993, sent Democrats Goodloe Byron and Beverly Byron to Congress. J.A. 655.[3]

Republican Roscoe Bartlett mounted his first challenge to Democrat Congresswoman Byron in 1982, but he lost by a 49-point margin. *Id.*, ¶ 8. He did not make another attempt until after the 1991 redistricting, *id.*, which flipped the Sixth District from Democratic to Republican.

In the 1992 election, Roscoe Bartlett defeated a new Democratic challenger by just over 8 percentage points and thereafter retained the seat through the 2010 election. J.A. 655 ¶ 8. Congressman Bartlett experienced the longest period of uninterrupted

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[3] Three of the plaintiffs supported Congresswoman Byron. J.A. 467-69 (Charles Eyler); J.A. 358 (Edmund Cueman); J.A. 276 (Sharon Strine).

Republican tenure in the District's modern history. J.A. 655 ¶ 7.

The Sixth District's political future is again open; John Delaney has announced his retirement from Congress, prompting the Maryland Republican Party chair to remark that the Sixth District "is a winnable race." Josh Hicks, *Maryland Politics: Republican Outside Groups Take a Rare Interest in Deep-Blue Maryland*, The Washington Post, Jan. 12, 2018.

2. The five counties of the current Sixth District—Garrett, Allegany, Washington, Frederick, and Montgomery—were all part of Maryland's original Frederick County as it existed in 1748, J.A. 947-48, and from 1872 until 1991 some portion of Montgomery County was included in the Sixth District in every legislatively enacted map.[4] *See* J.A. 979-93. Thus, in failing to include Montgomery County in the Sixth District, the 1991 redistricting plan represented a break in the District's historical geographic continuity.

After the 2001 redistricting, the Sixth District encompassed the western counties of Garrett, Allegany, Washington, and Frederick but departed from tradition by sweeping east to take in parts of Baltimore and Harford Counties—spanning a distance of more than 170 miles along the northern border. J.A. 995.

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[4] In the 1960's, a *court*-drawn map excluded Montgomery County from the Sixth District. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 736-37 (D. Md. 1966).

3. a. The 2011 redistricting plan restored significant portions of Montgomery County to the Sixth District. This return to historic norm allowed the drafters to respond to the Maryland Legislative Black Caucus's request to reduce from three to two the number of districts with population in adjacent Prince George's County, *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). *Compare* J.A. 995 *with* J.A. 997. As a result, they reassigned 68,656 registered voters from the former Fourth District to the Sixth District. J.A. 773.

The 2011 map also reversed the First District's extension across the Chesapeake Bay Bridge into Anne Arundel County, which had been in place since the 1991 redistricting.[5] *Id.* Eliminating those portions of Anne Arundel County required the drafters to reassign 107,577 people to the First District. J.A. 876, 914. The drafters accomplished this by extending the First District westward across the top of the Chesapeake Bay and along the northern border, which reapportioned 68,764 registered voters from the Sixth District to the Republican-represented First District. J.A. 773. Because the Second and Seventh Districts were underpopulated after the 2010 Census, J.A. 670, the Sixth District donated an additional 17,206 registered voters

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[5] To protect then-incumbent Republican Helen Bentley's First District seat, the 1991 map had attached to that district "a portion of Anne Arundel County to the eastern shore by way of the Chesapeake Bay Bridge." *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 409 (D. Md. 1991) (Niemeyer, J., dissenting), *aff'd*, 504 U.S. 938 (1992); *see id.* at 398.

to achieve population equality in those districts. J.A. 773. As a result, the northern border of the Sixth District along the Pennsylvania line contracted to include only the historic core counties of Garrett, Allegany, and Washington. J.A. 997.

b. The current Sixth District also joins populations along the I-270 corridor, "one of Maryland's premier economic regions." J.A. 1052; J.A. 695 (depicting Sixth District in relation to I-270); J.A. 440 (describing significant increase in commuter rail and automobile traffic along I-270 corridor prior to the 2011 redistricting); J.A. 844. Home to a thriving technology sector, the I-270 corridor connects Frederick and Montgomery Counties, which together account for 21.8% of Maryland's jobs and 25.4% of its total wages. J.A. 1052. About one-third of the 131,000 new residents Frederick County acquired in the decade preceding the 2011 redistricting came from Montgomery County. J.A. 440. These conditions were known to the public and State planners before the redistricting process began. J.A. 437, 1052.

The growth along the I-270 corridor also represented an important interest expressed by constituents during the redistricting process. J.A. 437-43 (Baltimore Sun article); J.A. 403-04, 409, 418-19, 422-23 (public testimony requesting redistricting committee consider I-270 corridor). Contemporary statements and testimony of Maryland decision-makers confirm the significance of the I-270 corridor as a consideration in drafting the Sixth District. J.A. 710-11; J.A. 43, 52-53 (Gov. O'Malley); J.A. 157-58 (Hitchcock); J.A. 193-96

(Senate President Miller); J.A. 937-38 ¶ 9 (Weissmann draft plan preserving I-270 corridor as "major feature" of Sixth District).[6]

Adding significant parts of Montgomery County in a way that kept largely intact the communities surrounding the I-270 corridor meant that 145,984 registered voters in the former Sixth were reassigned to the Eighth and 128,992 registered voters in the former Eighth were reassigned to the Sixth. J.A. 773. All told, reconfiguration of the Sixth District reassigned 66,417 registered Republicans to other districts and 24,460 registered Democrats to the Sixth. J.S. App. 19a. Putting aside changes required by the reconfiguration of the First District (i.e., reversing the extension across the Bay) and Fourth District (i.e., maintaining only two districts in Prince George's County), a net 40,066 registered Republicans were reapportioned out of the Sixth District and 18,420 registered Democrats were reapportioned into the Sixth. *Cf.* J.A. 773. That combined change of 58,486 registered Republicans and Democrats is smaller than the 64,608-vote margin that separated candidates John Delaney and Roscoe Bartlett in the 2012 election, J.A. 1026.

c. The Sixth District is, by multiple indications, competitive. Before 2011, the Cook Political Report rated the Sixth District as a safe Republican District;

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[6] Plaintiffs incorrectly state that "[n]one" of the Maryland decision-makers "testified that he or she even considered the I-270 corridor." Appellants' Br. 21. For this assertion, the plaintiffs rely on testimony from Eric Hawkins, even though the three-judge court found "no evidence" that Mr. Hawkins drew the final map. J.S. App. 19a.

it now rates the Sixth a "likely" Democratic district, J.S. App. 20a, with a Partisan Voting Index ("PVI") of D+2. J.A. 887. The Cook Political Report describes that score as in the "barely" Democratic range, and defines a "swing seat" as a district scoring between D+5 and R+5. J.A. 881.[7]

Since 2012, in the Sixth District, the mean of the two-party vote in all statewide elections is 47.1% Republican, as compared to 39.1% Republican statewide. J.A. 832. That mean is consistent with the Sixth District having a 53% Democratic Performance Index ("DPI"). A district is considered competitive when this mean is between 45% and 55%. J.A. 861, 1132.

As the three-judge court found, the electoral results in the current Sixth District demonstrate that it remains competitive for Republican candidates. First, incumbent Democratic Senator Ben Cardin carried the Sixth District with only 50% of the vote in 2012, "despite winning 56% of the vote statewide." J.S. App. 20a. Second, "[i]n 2014, Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District and operated at a financial disadvantage vis-à-vis Delaney." J.S. App. 21a (citations omitted). Third, also in 2014, Governor Larry Hogan "won 56% of the vote in the Sixth

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[7] The plaintiffs' reference to the D+2 rating of "likely" as "not considered competitive," Appellants' Br. 18, omits part of the quoted definition, which states that such districts "*have the potential to become politically engaged*." J.A. 1107. The Cook Report's 2012 overview, however, includes within the range of "competitive districts" the "[s]wing [s]eats" rated "between D+5 and R+5." J.A. 881.

District, besting his Democratic rival by 14 percentage points." J.S. App. 21a. And Washington County, a majority-Republican county included in both the former and current Sixth District, voted with Montgomery and Frederick Counties to elect John Delaney to Congress in 2012. J.A. 1026.

d. Republican engagement in the five counties included in their entirety within the former Sixth District has increased since formation of the newly competitive Sixth District. From 2010 to 2016, Republican voter registration increased in each year in Allegany, Carroll, Frederick, Garrett, and Washington Counties. J.A. 1054-58. In each of these counties, turnout among Republicans also increased in absolute terms between the presidential election year of 2008 and the presidential election year of 2012. J.A. 1059. And, while turnout was down across the board in the 2014 gubernatorial election compared to the 2010 election, Republican turnout in the Sixth District outpaced Democratic turnout. J.A. 1060.

Consistent with the objective general election data showing Republican voter engagement, all of the plaintiffs voted regularly after the 2011 redistricting. *See* J.A. 274-75 (Strine); J.A. 532-33 (DeWolf); J.A. 569 (O'Connor); J.A. 356-57 (Cueman); J.A. 464-67 (Eyler); J.A. 316-17 (Ropp); J.A. 498 (Benisek). Some even became politically active for the first time or increased their political activity in response to redistricting. J.A. 535 (DeWolf); J.A. 298, 306 (Strine describing extensive campaigning activity); J.A. 316-17 (Ropp); J.A. 571-72 (O'Connor); J.A. 502, 1085 (Benisek switched

his registration status to Republican after the 2011 redistricting).[8]

4. The 2011 congressional redistricting process followed Maryland's customary procedure. *See* Md. Const. art. III, § 5 ("[A]fter public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts[.]"); *id.* (The Governor shall then "present the plan to the President of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census[.]").

a. It is customary for the Governor to appoint a Governor's Redistricting Advisory Committee ("GRAC") to assist in the preparation of the plan. *See, e.g.*, *Legislative Redistricting Cases*, 331 Md. 574, 579 & n.1 (1993). The Senate President and the House Speaker traditionally serve on the GRAC. *See id.* Governor O'Malley followed this custom in 2011, and also included Appointments Secretary Jeanne D. Hitchcock; James J. King, a former Republican member of the House of Delegates from Anne Arundel County; and Richard Stewart, a private business owner. J.A.

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[8] In contrast with these first-hand accounts of political engagement, plaintiffs repeat out-of-court statements of unidentified speakers about why they did not intend to vote. *E.g.*, Appellants' Br. 19. The three-judge court offered no indication that it considered the statements in denying the preliminary injunction motion and did not resolve a pending hearsay objection. J.S. App. 18a-21a.

657 ¶¶ 18-21. Yaakov "Jake" Weissmann served as staff support to the GRAC and participated in the drafting of the 2011 redistricting plan. J.A. 937 ¶ 7.

The GRAC held public hearings in all areas of the State. J.A. 657-58. One of this litigation's original plaintiffs told the GRAC that, "based on history and geography," combining "the western third of Montgomery County . . . with Western Maryland . . . would be a reasonable situation and one that existed several decades ago." J.A. 434 (Shapiro). Constituents also expressed a desire for competitive political districts. J.A. 402. Mr. Shapiro observed that non-competitive districts had "decreased turnout and interest" in the general election "where the result is usually a foregone conclusion." J.A. 435. Democrats in Frederick County told the GRAC that they felt "shut out of the process" because "their politics weren't represented at all at the national level." J.A. 413-14; *see also* J.A. 405-06, 408-09, 410-12, 417 (other commenters expressing affinity and common interests with Montgomery County and distance from Carroll, Harford, and Baltimore Counties).

b. Governor O'Malley observed another Maryland custom (J.A. 186-87, 189-90) by consulting with all members of the Maryland congressional delegation about their views on congressional redistricting, including Republicans Roscoe Bartlett and Andy Harris. J.A. 57-60. The congressional delegation contracted with Eric Hawkins to draw a draft map. J.S. App. 18a. Mr. Hawkins did not have any meaningful contact with the GRAC and could recall only one occasion when he met with state staff, a meeting that occurred "late in

th[e] process." J.A. 144-45. As for the map that Mr. Hawkins submitted to the GRAC, Governor O'Malley rejected it, J.A. 77, and instead oversaw the preparation of a separate proposal that differed substantially from the Hawkins map. J.A. 937-38 ¶ 9; J.A. 76-77.[9] As the three-judge court found, "there is no evidence that Hawkins personally created the final map that was enacted into law." J.S. App. 19a.

The map developed by staffers to the Governor and the GRAC rejected major features of the congressional delegation's proposed map: it (1) kept intact Washington County and several cities split by the congressional delegation's map; (2) limited the districts in Prince George's County to just two; (3) ensured that the Fourth District did not include population from Montgomery County, in response to constituent and state legislative requests; and (4) kept intact the I-270 corridor, making the connection between Frederick and Montgomery Counties a major feature of the Sixth District. J.A. 937-38; *compare* J.A. 941 *with* J.A. 997.

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[9] In an effort to tie the enacted plan to the Hawkins plan, the plaintiffs mistakenly represent that the maps labeled "Congressional Option 1" and "Congressional Option 2" and considered by "Maryland officials" were drafted by Mr. Hawkins and became the "model for the map that was ultimately enacted." Appellants' Br. 12. That representation is the result of their expert's unsupported and mistaken factual inference. *Compare* J.A. 1086, 1097, 1098 *with* J.A. 608. The Maryland drafters received only one proposal from the Congressional delegation, and Mr. Weissmann used the file names "Congressional Option 1" and "Congressional Option 2" merely to denote the two main congressional plans (as opposed to *state legislative* plans that were under consideration as well) to be considered by decision-makers. J.A. 608.

The map was formally submitted to the Governor and published for public comment on October 4, 2011. J.A. 660. Between October 4 and 11, 2011, the GRAC received hundreds of public comments on the proposed plan. The Governor made minor changes to the GRAC proposal and announced his plan on October 15, 2011. J.A. 660, 688.[10]

c. The Governor's plan was introduced on October 17, 2011, during a special legislative session. J.A. 660 ¶ 34. Four amendments to the plan were offered and rejected in the House, and a suite of technical amendments passed in the House and in the Senate. *Id.* The Governor signed Senate Bill 1 into law on October 20, 2011. *Id.*

Senate Bill 1 was petitioned to referendum. J.A. 661 ¶ 39. The referendum passed overwhelmingly, with 1,549,511 votes (64.1%) cast in favor and 869,568 votes (35.9%) against. *Id.* The plan won voters' approval not just in areas of Democratic voting strength, but also in 10 of the 12 counties, *see id.*, where

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[10] During this time, Mr. Weissmann answered emails from Congressional staffers about minor adjustments made to the public plans. J.A. 825 (dated October 13, after plan publicly available); 1104 (dated October 18, after plan was introduced). Contrary to the plaintiffs' claim, Appellants' Br. 11, these emails do not evidence any history of longstanding close collaboration between the Congressional delegation and the legislative drafters. Nor does a separate piece of correspondence cited by Appellants' Brief at 11 (citing J.A. 823), which was merely correspondence between Mr. Hawkins and Jason Gleason, "the chief of staff to Rep. Sarbanes," *id.*, and makes no mention of the State, Mr. Weissmann, or any state staff member.

registered Republicans outnumbered registered Democrats, including three counties located within the present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties, J.A. 1056. Only Carroll and Garrett Counties voted to reject the map. J.A. 661 ¶ 39.

5. In June 2012, this Court summarily affirmed a three-judge court's decision upholding the plan and rejecting a challenge that included both racial and partisan gerrymandering claims. *Fletcher v. Lamone*, 567 U.S. 930 (2012) (affirming 831 F. Supp. 2d 887 (D. Md. 2011)). In *Fletcher*, the three-judge court rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* 567 U.S. at 903-04.

**Proceedings in this Case**

1. The plaintiffs did not bring this action until November 2013, more than a year after the first election was held under the 2011 plan. The initial complaint and the amended complaint did not include the First Amendment retaliation theory on which plaintiffs now rely, and they did not seek preliminary injunctive relief until almost four years later.

After this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (2015), the plaintiffs waited four months before filing a second amended complaint. In that 2016 complaint, the

plaintiffs for the first time set forth their First Amendment retaliation claim. J.S. 7; *see also* J.A. 6. As articulated in their second amended complaint, plaintiffs assert that the drafters of the 2011 plan "purposefully and successfully flipped [the District] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." J.S. App. 87a (brackets in original). Again, the plaintiffs did not accompany their second amended complaint with a request for preliminary injunctive relief.

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. J.S. App. 80a-111a. A majority of the three-judge court held that a judicially manageable standard existed to adjudicate the plaintiffs' claim. Under that standard, plaintiffs must show that: (1) "those responsible for the map redrew the lines of" a plaintiff's district "with the specific intent to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." J.S. App. 104a. The majority also explained that the injury element must be measured by the apportionment's

"real-world consequences"; "including, most notably, whether the State's intentional dilution . . . has actually altered the outcome of an election." J.S. App. 107a.

Nine months after the three-judge court's decision, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. J.A. 25. During the pendency of that motion, the district court, on its own initiative, requested briefing on whether a stay should be entered in light of this Court's orders in *Gill v. Whitford*, U.S. No. 16-1161. J.A. 27.

2. After oral argument, the district court denied the request for preliminary injunction and entered a "stay pending further guidance" from this Court's disposition of *Gill*. J.S. App. 2a. The district court declined to dispose of the parties' fully briefed cross-motions for summary judgment or to accelerate the trial on the merits under Federal Rule of Civil Procedure 65(a)(2). J.S. App. 2a n.1.

In its opinion denying the preliminary injunction, the three-judge court made fourteen "preliminary" findings. J.S. App. 6a. These included a finding that Congressman Bartlett had "underperformed the other seven members of Maryland's congressional delegation in fundraising leading up to his defeat in the 2012 election." J.S. App. 21a. The district court also found that "Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District" and "operated at a financial

disadvantage vis-à-vis Delaney," and in the same election, "Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points." J.S. App. 21a.

In denying preliminary injunctive relief, the three-judge court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. J.S. App. 2a. The plaintiffs were not likely to succeed in carrying their burden of proving that it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." J.S. App. 17a.

The three-judge court explained that the plaintiffs can succeed on the merits of their claim "*only* if" they prove that "Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact." J.S. App. 25a.[11] This showing of causation is indispensable because, "if an election result is not engineered through

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[11] To confirm the plaintiffs' own understanding that this is their burden, the three-judge court quoted from the plaintiffs' briefing: "'[O]ur burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016.'" J.S. App. 25a (brackets in original).

a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." J.S. App. 24a. That is, "[i]f the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*." J.S. App. 25a.

3. On August 25, 2017, the plaintiffs filed a notice of appeal of the order denying a preliminary injunction. If this Court finds plaintiffs' claim justiciable, that interlocutory order is the only ruling properly before the Court under 28 U.S.C. § 1253.

## SUMMARY OF ARGUMENT

I. A. The First Amendment retaliation formula proposed by the plaintiffs does not resolve the "central problem" for a court attempting to address a claim of partisan gerrymandering, which is to determine when partisan considerations in the redistricting process have "gone too far." *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.). Although the plaintiffs purport to leave room for "permissible" partisanship and a "de minimis" effect on their voting strength, Appellants' Br. 6, 27, 29, 36, 37, 38, 40, 54, they do not define what that means, thereby leaving it for courts to assess on some indeterminate basis. By dodging the problem, the plaintiffs' proposed standard threatens to render *any* partisan motive fatal to redistricting—something that this Court has already rejected.

Nor did the three-judge court, in adopting the standard the plaintiffs proposed below, resolve this

"central problem." Under its test, vote dilution becomes actionable when it alters electoral outcomes, but this Court has long rejected that test, *Vieth*, 541 U.S. at 297, 299, even within the well-charted area of racial gerrymandering. *LULAC*, 548 U.S. at 428 (plurality op.). "[T]he right to equal participation in the electoral process does not protect any 'political group,' however defined, against electoral defeat." *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77 (1980). In the end, the plaintiffs' test, as adopted by the three-judge court, is much less exacting than the standard used to invalidate racial gerrymanders.

B. The plaintiffs' proposed standard uses the status quo ante as the constitutional benchmark against which to measure the partisan effect of redistricting, whether or not "the status quo ante was constitutionally fair, permissible, or required." Appellants' Br. 49. That not only contradicts *LULAC*, which rejected the notion that a prior district had "any special claim to fairness," 548 U.S. at 446; it also would give constitutional protection to a preexisting partisan gerrymander and authorize courts to invalidate redistricting legislation that attempts to *cure* that gerrymander, an absurd result.

C. 1. The First Amendment retaliation intent and causation elements also fail to supply a fitting and manageable standard. Determining retaliatory animus becomes impracticable in the redistricting setting, where reapportionment legislation results from the input of numerous actors with differing motivations, and the secret ballot precludes defendants' knowledge of an individual plaintiff's voting behavior. Precisely

because of this difficulty, these plaintiffs advocate a less demanding intent standard, one unmoored from established retaliation jurisprudence.

2. The requirement that plaintiffs prove causation similarly does little to make political gerrymandering justiciable under a First Amendment retaliation theory. The three-judge court's demand for evidence of "*how* and *why*" actual voters would have voted in hypothetical elections "in a neutrally drafted Sixth District," J.S. App. 26a, promises to mire courts in speculation of the sort deemed too problematic in *LULAC*, 548 U.S. at 420 (Kennedy, J.). It is hard to overstate the impracticality of accumulating and reliably evaluating evidence needed to predict voting behavior in such an alternative universe, a world in which the pertinent variables will have all changed to some unknown degree. The abstract nature of the inquiry itself renders the proposed standard unmanageable.

D. Finally, the three-judge court's standard would conflict with multiple principles underlying this Court's redistricting jurisprudence. It would call into question *Gaffney v. Cummings*, where map-drawers specifically and intentionally employed partisan affiliation to "achieve 'political fairness' between the political parties," 412 U.S. 735, 736 (1973). It would similarly frustrate States' preferences for incumbent-protection and competitive districts, both of which require assignment of population on the basis of political affiliation.

II. Even if the plaintiffs' First Amendment retaliation claim were justiciable, the three-judge court

acted within its broad discretion in denying preliminary relief. The plaintiffs failed to demonstrate likelihood of success on the merits of their retaliation claim because they had not established an injury caused by the 2011 redistricting. They acknowledged below that their burden was to show that "purposeful dilution" of Republican votes in the Sixth District was a "but-for cause" of the Republican losses in 2014 and 2016. J.S. App. 25a. But the plaintiffs now claim that they need show only a "more-than-de-minimis burden" on their First Amendment rights, Appellants' Br. 54, without defining what that means in the electoral context. Instead, despite real-world evidence showing that John Delaney's success in the Sixth District was likely due to a variety of different factors, plaintiffs offer the same type of statistical predictors that proved so wrong in the 2016 presidential election.[12]

Having unsuccessfully attempted to minimize their burden, the plaintiffs next try to *shift* their burden onto defendants and require them to disprove but-for causation under *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). But the *Mt. Healthy* framework does not apply where the causal link between the alleged animus and the alleged injury is

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[12] *See* Sam Wang, *Why I Had to Eat a Bug on CNN*, New York Times, Nov. 18, 2016 (https://www.nytimes.com/2016/11/19/opinion/why-i-had-to-eat-a-bug-on-cnn.html) (discussing statistical predictors indicating that there was "an extremely high probability that Hillary Clinton would win" the 2016 presidential general election).

"more complex than it is in other retaliation cases." *Hartman v. Moore*, 547 U.S. 250, 261 (2006).

Even if *Mt. Healthy* applied here, the plaintiffs have not established the requisite injury. *Mt. Healthy*'s burden-shifting framework "assumes an injury has occurred." J.S. App. 24a. That makes sense where the official action at issue is inherently adverse, as is termination or harassment in the employment context, but redistricting can be injurious under the three-judge court's test only "if it actually alters the outcome of an election." *Id.* Because the plaintiffs failed to demonstrate that the map caused them that harm, the three-judge court rightly declined to shift the burden.

The plaintiffs also are unlikely to succeed on the merits of their claims for other reasons. First, the plaintiffs are unlikely to prove that Maryland decision-makers harbored "vengeful" intent toward them, *Hartman*, 547 U.S. at 256, simply by creating a map that would make the Sixth District more competitive and thus improve the chances of a Democratic candidate. Second, the plaintiffs cannot prove that the changes in the Sixth District's boundaries were caused by any supposed animus when those boundaries were significantly affected by changes made to other districts for nonpartisan reasons. Third, the plaintiffs are wrong that vote dilution, as they conceive of it, burdens their individual rights. Appellants' Br. 26. Individually, each plaintiff's vote was weighted identically to all other votes cast in Maryland in 2012; only when the plaintiffs' votes are aggregated with other Republicans' does it become possible to assert that the group's votes have

been "diluted." But vote dilution, as developed under § 2 of the Voting Rights Act, 52 U.S.C. § 10301, requires evidence of social or historical circumstances that undermine a group's opportunity to obtain electoral success, none of which is present here. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Finally, the plaintiffs' delay in seeking a preliminary injunction weighs heavily against preliminary relief, particularly when the relief sought requires court intervention in an upcoming election. *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., circuit justice denying application for relief). A State suffers irreparable injury whenever it is "'enjoined by a court from effectuating statutes enacted by representatives of its people,'" and, here, by the people themselves directly on referendum. *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

## ARGUMENT

### I. Partisan Gerrymandering Claims Based in First Amendment Retaliation Theory Are Neither Judicially Manageable nor Justiciable.

Although an "equal protection challenge to a political gerrymander presents a justiciable case or controversy," *LULAC*, 548 U.S. at 413 (citing *Davis v. Bandemer*, 478 U.S. 109 (1986)), the plaintiffs' First Amendment retaliation claim does not. *See Baker v. Carr*, 369 U.S. 186, 227 (1962) (observing that a

challenge may be nonjusticiable under one theory though justiciable under another). To date, this Court has not recognized as justiciable any partisan gerrymandering claim grounded in the First Amendment. Although no First Amendment claim was before the Court in *Vieth*, the plurality opinion dismissed the possibility that the First Amendment could provide a foundation for a justiciable partisan gerrymandering claim because, if such a claim "were sustained, [it] would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation" in government hiring for certain jobs. 541 U.S. at 294 (plurality op.); *but see id.* at 314 (Kennedy, J.). Two years later in *LULAC*, when the Court rejected a First Amendment challenge to a mid-decennial redistricting plan for lack of manageable standards, one justice opined that where partisanship was allegedly the legislation's "sole motivation," plaintiffs could not show a measurable burden on "representational rights" under the First Amendment. 548 U.S. at 418 (Kennedy, J.).

In this case, the plaintiffs propose an untested theory for adjudicating partisan gerrymandering claims: First Amendment retaliation. The second amended complaint claims that the 2011 Maryland redistricting plan—legislatively enacted, petitioned to referendum, and approved by a majority of voters in 22 of Maryland's 24 counties—amounts to a "sanction" against Republican voters within the Sixth District for having elected a Republican in the previous several elections. J.A. 648.

The First Amendment partisan gerrymandering theory adopted by the three-judge court below suffers from infirmities similar to those theories rejected in *Vieth*, *LULAC*, and elsewhere. The plaintiffs' theory does not define how much partisanship is too much; it elevates the preexisting configurations of districts to constitutional benchmarks; and it describes the intent and causation elements in a way that defies practical proof.

### A. First Amendment Retaliation Theory Does Not Provide a Judicially Manageable Standard for Determining How Much Partisanship Is Too Much.

The First Amendment retaliation formula proposed by the plaintiffs and adopted by the three-judge court has one principal disqualifying flaw: it does not resolve, and does not purport to resolve, the "central problem" for a court attempting to address a claim of partisan gerrymandering. *Vieth*, 541 U.S. at 296 (plurality op.). As the plurality emphasized in *Vieth*, and all justices there acknowledged in one way or another, that central problem is determining when the redistricting process, which is "root-and-branch a matter of politics," *id.* at 285, nonetheless "has gone too far," *id.* at 296. Regardless of the constitutional premise of the claim, the recurring problem facing plaintiffs is "providing a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S. at 420 (Kennedy, J.).

Despite this Court's clear recognition of the need for a manageable standard for courts to determine when partisanship "has gone too far," *Vieth*, 541 U.S. at 296, the plaintiffs here insist that their First Amendment retaliation claim does not and need not attempt to solve that central problem. Appellants' Br. 27 ("[T]he First Amendment retaliation framework does not . . . require courts to determine when a map has gone 'too far.'"). But the evasion urged by the plaintiffs would amount to "an end-run around established principles of justiciability." *Camreta v. Greene*, 563 U.S. 692, 723 (2011) (Kennedy, J., dissenting).

The plaintiffs offer no "clear, manageable, and politically neutral" standard for measuring "the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring). Their standard would sweep *all* political and partisan classifications within its reach and prohibit them, except for those that are "de minimis" in effect—a term the plaintiffs do not bother to define. Appellants' Br. 37-38. Because the plaintiffs' proposed test does not offer "sure guidance," it is unmanageable and destined to produce "disparate and inconsistent" results. *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring).

Nor does the three-judge court's articulation of the plaintiffs' claim solve the problem, because it combines two components that this Court has previously deemed unsatisfactory for measuring the degree of partisanship in a gerrymander: vote dilution and electability of plaintiffs' preferred candidate.

The three-judge court defined the injury prong of a retaliation claim as the "burden" on First Amendment rights "that usually takes the form of *vote dilution*." J.S. App. 3a. It further defined the injury as a map that "diluted the votes of the targeted citizens to such a degree that it resulted in tangible and concrete adverse effect." *Id.* at 4a. Although one justice in *Vieth* proposed vote dilution as the injury suffered under the discriminatory effects prong of an equal protection claim,[13] a majority of justices rejected that standard as inadequate to provide a judicially manageable standard. *Vieth*, 541 U.S. at 297-98 (plurality op.); *id.* at 307-08, 317 (Kennedy, J., concurring).

To be justiciable, any claim identifying vote dilution as the injury must set "a manageable standard by which to measure the effect of the apportionment" before it can be concluded that a State "impose[d] a burden or restriction on the rights of a party's voters." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring); *see id.* at 297 (plurality op.) (A "test ought to identify deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled."). Simply transposing the vote dilution injury from equal protection to the First Amendment context does nothing to ameliorate the difficulties of identifying "how much" vote dilution "is too much." *Id.* at 297.

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[13] *Vieth*, 541 U.S. at 351 (Souter, J., dissenting) (proposing a standard where plaintiff must show "his State intentionally acted to dilute his vote").

Under the plaintiffs' standard, *any* measurable amount of vote dilution is too much.

The three-judge court recognized the necessity of some line-drawing in this regard, by acknowledging that "an abstract 'burden'" that does not "actually affect[] tangible voter rights or interests surely is not justiciable." J.S. App. 23a; *see, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (First Amendment retaliation claim requires a governmental infliction of "a tangible punishment" on a citizen in an effort to suppress her protected speech activity). Still, the three-judge court did not venture to explain how being in an electoral minority, in itself, would affect tangible voter rights or interests. As for the plaintiffs, they merely assert that being less able to elect a candidate of choice presents a "real and practical disadvantage." Appellants' Br. 41.

But residence in a specific congressional district does not deprive the resident of something tangibly "valuable" or involve the "serious privation" at issue in *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990). "[T]he power to influence the political process is not limited to winning elections," and a citizen placed within or without a district who does not vote for the winning candidate "is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Bandemer*, 478 U.S. at 132. Any member of a political minority may still vote in elections, campaign for preferred candidates, petition her representative, and access constituent services. A

redistricting plan has no inherent impact on who is on the ballot, who can cast a vote, or when votes may be cast, and is therefore not a tangible "restriction[ ]" impacting individuals' ability "'to cast their votes effectively.'" *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (citation omitted). This is one reason courts addressing a claim of vote dilution under the Voting Rights Act consider whether there is any historical evidence that representatives are "unresponsive to the particularized needs of the members of the minority group." *LULAC*, 548 U.S. at 426 (citation omitted).

In a search for tangible effects, the three-judge court ran into another problem: It drew the line between tangible and intangible interests at the point where a seat changes hands. J.S. App. 25a. That proposed demarcation conflicts with this Court's political gerrymandering jurisprudence, which makes clear that "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult." *Bandemer*, 478 U.S. at 132 (plurality op.); *see also Bolden*, 446 U.S. at 77.

Using electoral outcomes to define "how far is too far" also conflicts with this Court's racial gerrymandering jurisprudence, which has long recognized that "[t]he circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428. Instead, in the § 2 Voting Rights Act context, this Court has held that vote dilution involving no mathematical inequality in population must be considered in light of "the totality of the

circumstances," including a number of political and social factors indicating a history of oppression of the racial minority group in question. *Id.* at 425-26 (citations omitted); *see also Gingles*, 478 U.S. at 47 ("The essence" of a § 2 vote dilution claim is that redistricting "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."). The plaintiffs, by maintaining that they need only show a "more-than-de-minimis burden" imposed by loss of electoral advantage, Appellants' Br. 54, propose for themselves a partisan-effects burden that is *more easily met* than its racial gerrymandering counterpart.

The three-judge court acknowledged that "citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate." J.S. App. 91a. Yet the court proceeded as if it were permissible to disregard the usual requirement that a successful First Amendment claim must establish harm of *constitutional* significance. To be faithful to the retaliation jurisprudence the three-judge court professed to adopt as its guide, the plaintiffs would have to have established, as a matter of law, that a resident suffers tangible harm merely by living in a district where one's political party is in the minority or where one's preferred candidate does not command a majority of voters' support. This Court has already stated that such circumstances do not constitute harm of a constitutional magnitude—yet another reason why the theory proposed by the plaintiffs and adopted

by the three-judge court does not provide a workable judicial standard.

### B. Plaintiffs' Theory Impermissibly Assumes That Preexisting District Configurations Are the Constitutional Benchmark.

In addition to not solving the "how much is too much" problem, the plaintiffs' proposed standard rests on the flawed premise that the preexisting map was constitutionally preferable. Their only proposal to measure how a citizen's vote may be diluted is to determine whether the citizen is at "a concrete political disadvantage vis-à-vis the status quo ante." Appellants' Br. 42. That is, under the proposed standard, the plaintiffs are harmed in a constitutional sense if under the new map it is "almost certain that their candidate would lose, whereas" under the prior plan "they were likely to win." *Id.* The plaintiffs further assert that this test applies "whether [or not] the status quo ante was constitutionally fair, permissible, or required." *Id.* at 49.

Elevating to constitutional status a prior district that is itself the result of partisan considerations contravenes *LULAC*, which rejected the notion that the composition of a prior district "has any special claim to fairness," particularly where the old district "was formed for partisan reasons." 548 U.S. at 446-47 (Kennedy, J.). Constitutionalizing pre-existing districts also produces absurd results. The plaintiffs' theory would bar claims from voters who continue to be affected by

a gerrymander, while allowing claims from voters newly in the political minority after a redistricting designed to *cure* a prior partisan gerrymander.

Locking in the "status quo ante" also carries within it an inherent partisan bias. That is, it would preserve and perpetuate the political dominance one party might enjoy across the national landscape under prior redistricting, and do so at the expense of the current preferences of voters and their representatives. *See* Jowei Chen & David Cottrell, "Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House," 44 Electoral Studies 329, 336, 337 fig. 4 (2016) (discussing the two major parties' relative control over states' redistricting processes). Using existing district configurations as the constitutional benchmark *itself* thus has an unintended partisan effect. It is difficult to imagine how a test grounded in comparison to the maps of the past could possibly provide a remedy for current ills.

Unlike proposed tests that use social science metrics to measure the direct constitutional burden of a map, *Whitford v. Gill*, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2016) (measuring effect on partisanship of current map); *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 341658, at *47 (M.D.N.C. Jan. 9, 2018) (measuring effect on partisanship of current map), the plaintiffs' proposal tests only for *relative* indirect harm. Consequently, the plaintiffs' test will prove unworkable in many redistricting cases.

As *amici* have described, relying on relative harm results in a test that, among other shortcomings, cannot detect partisan gerrymanders enacted in a prior reapportionment cycle; nor can the test provide a meaningful comparison where, for example, reapportionment results in the addition or deletion of districts. Conversely, the plaintiffs' proposed test would identify as partisan gerrymanders maps that (1) move a prior map toward a more proportional configuration, a legislative objective permitted by this Court's gerrymandering jurisprudence, *see LULAC*, 548 U.S. at 419 (Kennedy, J.); *Gaffney*, 412 U.S. at 754; *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (rough proportionality supported finding of no vote dilution in Voting Rights Act, § 2 claim); or (2) maintain overall proportional partisan representation while flipping one or more districts to favor the other party. *See* Amicus Br. for Campaign Legal Center, *et al.* at 21-29; Amicus Br. of the American Civil Liberties Union, *et al.* at 17-21. The test proposed by plaintiffs will not provide a judicially manageable test for determining partisan gerrymanders.

### C. First Amendment Retaliation Principles Do Not Fit the Representational Interests Involved in Redistricting.

First Amendment retaliation case law offers no source of "well developed and familiar" standards, *Baker*, 369 U.S. at 226, to adjudicate a claim that a state's reapportionment legislation is retaliatory—unlike equal protection claims, which are routinely used

to challenge legislative enactments and have modes of proof that are applicable regardless of the subject matter of the legislation, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977); *see also, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1479 (2017).

This Court's three-part framework for adjudicating First Amendment retaliation claims emerged from three contexts where applicable law generally forbids *any* intrusion of political considerations: (1) employment, *e.g.*, *Rutan*, 497 U.S. at 79; (2) contracting, *e.g.*, *Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996); and (3) law enforcement and corrections, *e.g.*, *Crawford-El v. Britton*, 523 U.S. 574 (1998). The same analysis does not translate to the redistricting context, where the state action takes the form of legislation, and applicable law deems the redistricting process to be "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285.

Unlike political gerrymandering jurisprudence, the judicial standards used to evaluate First Amendment retaliation claims have evolved almost entirely outside the context of *legislative* activity. In a line of cases following *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding statute that punished knowing destruction or mutilation of selective service registration certificates), lower courts have rejected First Amendment retaliation claims, like plaintiffs', alleging that statutes indirectly burdened First Amendment rights. *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (stating that such challenges do "not present[] a cognizable First Amendment claim"); *see also Bailey v.*

*Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Kensington Vol. Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 467-70 (4th Cir. 2012); *Southern Christian Leadership Conf. v. Supreme Court of La.*, 252 F.3d 781, 795 (5th Cir. 2001); *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d 770, 775 (7th Cir. 1999); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-59 (4th Cir. 1989).

Lower courts have further recognized that allowing First Amendment retaliation challenges to legislation would invite litigation laden with the sort of political disagreements courts are ill-suited to resolve: "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). Broad and frequent inquiries into legislative motive "'undermine[] 'the public good' by interfering with the rights of the people to representation in the democratic process.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (citation omitted). The interference is "of particular concern" at the local level, "where the part-time citizen-legislator remains commonplace." *Id.*

The risk of interfering with the democratic process is greatest in the political gerrymandering context, where "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation," whereas the same is

"not so for claims of racial gerrymandering." *Vieth*, 541 U.S. at 286 (plurality op.).

### 1. Retaliatory Intent Is a Less Manageable Standard Than Discriminatory Intent.

The three-judge court described the level of intent necessary to state a claim under their First Amendment retaliation theory as "*specific intent* to impose a burden on [the plaintiff] and similarly situated citizens because of how they voted or the political party with which they were affiliated." J.S. App. 104a. The three-judge court further explained that it would be sufficient to prove that map-drawers used political data "for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed." J.S. App. 105a. The plaintiffs now assert that this standard is satisfied by showing either (1) an intent to injure people with particular voting histories or party affiliations or (2) something less than an intent to injure: a mere "hope" that, after fulfilling "constitutional responsibilities" and "respecting the law," a district could be created "where the people would be more likely to elect a Democrat than a Republican." J.A. 79-80; *see also* Appellants' Br. 36; J.S. App. 67a-68a (Niemeyer, J., dissenting).

The three-judge court attempted to impose a limit on this broad construction of intent, by stating that "merely proving that the legislature was aware of the

likely political impact of its plan and nonetheless adopted it is not sufficient to prove" the motivation necessary to sustain the claim. J.S. App. 106a. Now the plaintiffs seek to discard that limitation, and instead rely on the notion that, "'[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.'" Appellants' Br. 36 (quoting *Bandemer*, 478 U.S. at 129). But the *Bandemer* proposal has proved unworkable in the equal protection context, *see Vieth*, 541 U.S. at 285-86, and therefore cannot satisfy the need for manageable standards.

The plaintiffs' broad framing of the intent standard is not drawn from "well developed and familiar," *Baker*, 369 U.S. at 226, First Amendment retaliation standards. Under those standards, the plaintiffs must show that a government actor punished or failed to reward an individual "for speaking out." *Hartman*, 547 U.S. at 256. This "more specific" motivation, *Crawford-El*, 523 U.S. at 592, is the hallmark of a First Amendment retaliation claim. Accordingly, when the government actor has "no knowledge" of an individual's alleged expressive conduct, there is no claim, and such cases routinely end in dismissal or summary judgment in favor of defendants. *Moss v. Harris County Constable Precinct One*, 851 F.3d 413, 421 (5th Cir. 2017); *Wackett v. City of Beaver Dam, Wis.*, 642 F.3d 578, 582-83 (7th Cir. 2011); *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 750-51 (9th Cir. 2001).

For a legislature to act with a "vengeful" eye toward the plaintiffs' past First Amendment expression, its members would have to *know* about that expression first. A hurdle to judicial manageability is apparent: if, as the three-judge court has posited here, the impermissible retaliation against the plaintiffs could be as a result of "how they voted," J.S. App. 3a, the legislature would need to know *how they voted*. But an individual's voting history is unknowable by the government, due to the secrecy of the ballot. *See* Md. Code Ann., Elec. Law § 9-203(4). Election results are known and reportable at no smaller unit than the precinct. Md. Code Ann., Elec. Law § 11-402(a), (d)(1)(i).

Moreover, voting behavior cannot be inferred from party registration. It "is assuredly not true" that "the only factor determining voting behavior at all levels is political affiliation." *Vieth*, 541 U.S. at 288 (plurality op.). If registration determined voting history, Governor Larry Hogan, a Republican, could not have been elected in Maryland, where registered Democrats outnumber registered Republicans by nearly 2:1. Perhaps because of the recognized disconnect between party registration and voting behavior, no evidence in this or other pending partisan gerrymandering claims suggests that an individual's partisan affiliation served as a basis for legislative decision making. J.A. 90; J.A. 936-37; *Whitford*, 218 F. Supp. 3d at 936 n.3 (Griesbach, J., dissenting) ("Plaintiffs offered no evidence as to actual party membership in Wisconsin."); *Rucho*, 2018 WL 341658, at *3 (redistricting plan

developers used "[p]ast election data" rather than voter registration information).

Even if the problem of discerning an individual voter's expressive activity were surmountable, a court would still confront another confounding question: the need to identify who possessed the retaliatory motive. "Whose intent?" is answerable in the employment, contracting, and law enforcement contexts, but the inquiry is more difficult when legislative motive is at issue. The plurality in *Vieth* identified that difficulty in rejecting the First Amendment as a basis for adjudicating political gerrymandering claims, 541 U.S. at 296 (asking *"[h]ow many legislators"* must have held the requisite intent), but this case demonstrates a further complicating factor. After a successful referendum petition, 1,549,511 Maryland residents, each with his or her own motivations, voted in favor of the law. J.A. 661.

Even if the motives of a few legislators could be attributed to others, the motives of legislators cannot be attributed to the people, particularly not to the voters in Allegany, Washington, and Frederick Counties—three majority-Republican counties within the Sixth Congressional District where voters *approved* the 2011 redistricting map. J.A. 661 ¶ 39; J.A. 1056. "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J., plurality op.).

"'[T]he true principle of a republic is, that the people should choose whom they please to govern them.'" *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015) (citation omitted). As the Court has recognized, direct voter participation through referendum serves "to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen . . . by the People of the several States.'" *Id.* Thus, for a court to overturn a plan that was endorsed by 64.1% of Marylanders who voted on the question, after opportunity for public debate, may pose "serious First Amendment implications" of its own. *Schuette*, 134 S. Ct. at 1637 (Kennedy, J., plurality op.).

### 2. Requiring Causation Only Raises Further Problems for Justiciability.

As articulated by the three-judge court, the plaintiffs' claim requires them to show "that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." J.S. App. 4a. Requiring an additional element beyond the familiar intent and effects prongs of an equal protection claim does nothing to solve the problems already identified and, instead, significantly complicates the problem of judicial manageability.

The three-judge court concluded that it would need "evidence of a sufficient quantity to demonstrate *how* and *why* voters who would have been included in a neutrally drafted Sixth District voted in the 2012, 2014, and 2016 elections" in order to evaluate the plaintiffs' claims in this case. J.S. App. 26a. The three-judge court speculated that such evidence might take the form of "voter sampling or statistical data" or "affidavits." *Id.* Any pursuit of this type of proof would require a court to make factual findings about what "would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (Kennedy, J.). Such an inquiry leads to an inevitable failure of practical proof because, "'[i]f the districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes.'" *Vieth*, 541 U.S. at 289 (quoting Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59-60 (1985)).

Moreover, the three-judge court gave no guidance as to what characteristics a "neutrally drafted" comparator district would need to have. The record shows that map-drawers made decisions about border placement in the Sixth District for multiple reasons, including reasons having to do with the shape of other districts. *E.g.*, J.A. 698-712. Even when considering just the border between the Sixth and Eighth Districts, any reconstruction of a hypothetical election would require inquiry into the voting habits of no less than 145,984 people who were assigned new voting districts.

J.A. 773. That such an inquiry would be necessary under the three-judge court's standard demonstrates that the First Amendment retaliation claim is even less manageable than those standards previously rejected for equal protection partisan gerrymandering claims.

### D. Plaintiffs' Standard Would Call Into Question Political Considerations That this Court Has Previously Approved.

Although the plaintiffs insist that their standard would allow some consideration of partisan intent and would not prohibit conduct that this Court has expressly held to be constitutional in the past, Appellants' Br. 47, even a cursory examination of the plaintiffs' First Amendment retaliation standard, within the scenarios they mention, demonstrates otherwise.

In *Gaffney v. Cummings*, the Court rejected a challenge to a Connecticut plan under which "virtually every" line was drawn with "conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752. In order "to allocate political power to the parties in accordance with their voting strength," Connecticut necessarily placed citizens within districts *because of* their collective past voting history. *Id.* at 754. To accomplish the goal of proportional representation, the legislature enacted a plan that left "the minority in each safe district without a representative of its choice," *Bandemer*,

478 U.S. at 131 (plurality op.), and thereby diluted the votes of some members of the political minority.

The plan that this Court upheld in *Gaffney* would violate the standard that the plaintiffs propose, notwithstanding their attempts to distinguish it. Appellants' Br. 47. If, as the plaintiffs state, "the vote-dilution injuries" they claim to have suffered "are not remedied by creating a safe opposition district somewhere else in the State," Appellants' Br. 45 (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (brackets omitted)), Connecticut's conduct in *Gaffney* could not have been rendered constitutional simply because the goal was proportional representation, which inevitably involved offsetting vote dilution in one district with vote inflation in another. But this Court characterized those circumstances as the very point where "judicial interest should be at its lowest ebb." *Gaffney*, 412 U.S. at 754.

The plaintiffs' standard would also prohibit the constitutionally permissible objective of creating competitive districts, like Maryland's Sixth District. There are good reasons to prefer competitive districts, because "electoral competition 'plainly has a positive effect on the interest and participation of voters in the electoral process.'" *LULAC*, 548 U.S. at 471 n.10 (Stevens, J., dissenting) (quoting Potter & Viray, *Election Reform: Barriers to Participation*, 36 U. Mich. J.L. Reform 547, 575 (2003)); *see* Ariz. Const. art. IV, pt. 2 § 1(14)(F) (providing that "competitive districts should be favored where to do so would create no significant detriment to the other goals"). Yet, under the three-judge court's standard, a preference for competitive

districts would give rise to a retaliation claim. That is the basis of the plaintiffs' claim here.

It is no answer to say that the intent standard would distinguish Maryland's plan, enacted by the legislature and approved directly by voters in a referendum, from Arizona's, undertaken by a redistricting commission. Irrespective of who bears responsibility for a State's redistricting, it takes "no special genius to recognize the political consequences" of any given apportionment plan, *Gaffney*, 412 U.S. at 753, and where a plan seeks to create more competitive districts, the political consequences will be "known and, if not changed, intended," *id.* As a state governmental body, an independent redistricting commission is no less obligated to uphold the First Amendment than the legislature, and there is no reason the plaintiffs' cause of action, if approved, would be limited to acts taken by legislatures. Indeed, here the plaintiffs have extended their claim to encompass acts taken at referendum by a majority of Maryland voters.

The plaintiffs' logic would similarly invalidate legislative efforts to "preserv[e] the cores of prior districts, and avoid[] contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), and the quotidian business of ensuring that incumbents retain important legislative projects, *e.g.*, *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting) (discussing importance of ensuring districts "make some political sense"). Even when redistricting occurs without partisan aims, a "politically mindless approach may produce" partisan results, and "it is most unlikely that the political

impact of such a plan would remain undiscovered." *Gaffney*, 412 U.S. at 753.

Under the plaintiffs' standard, whenever a legislature knowingly approves a map that reassigns any number of voters to a district where they are no longer able to elect their candidate of choice, the map is unconstitutional. The plaintiffs may declare otherwise, Appellants' Br. 47, but these unreasonable results would be the likely outcome of their chosen intent standard.

## II. The Three-Judge Court Appropriately Exercised Its Discretion in Denying Plaintiffs' Belated Preliminary Injunction Motion.

If a First Amendment retaliation claim is justiciable in the partisan gerrymandering context, the three-judge court acted within its discretion in denying the requested preliminary relief. A three-judge court's order "'denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion.'" *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (citation omitted). The district court's assessment of a redistricting plan "warrants significant deference on appeal to this Court," and its factual findings "are subject to review only for clear error." *Cooper*, 137 S. Ct. at 1464-65. "Under that standard," the Court "may not reverse just because" it "'would have decided the [matter] differently,'" and any "finding that is 'plausible' in light of

the full record—even if another is equally or more so—must govern." *Id.* at 1465 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

The three-judge court denied relief based solely on its finding that the plaintiffs had failed to present evidence sufficient to satisfy one of four showings required for preliminary injunction: likelihood of success on the merits. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Perry v. Perez*, 565 U.S. 388, 394 (2012) (applying *Winter* in a redistricting challenge). The court found that "at this preliminary stage," it "cannot now conclude" that a finding of injury caused by the redistricting is "the *likely* outcome of this litigation[.]" J.S. App. 26a. The plaintiffs have not shown that this finding was clearly erroneous.

### A. The Three-Judge Court Correctly Applied Its Own Definition of Injury.

Under the three-judge court's framework, to establish injury caused by the redistricting, the plaintiffs' acknowledged "'burden [was] to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016.'" J.S. App. 25a (quoting Dkt. No. 191 at 13); *see also* J.S. App. 110a-111a (quoting plaintiffs' second amended complaint).[14] Thus, defeat of the plaintiffs'

[14] The three-judge court mentioned future elections when expressing doubt that "the harm is presently occurring or very likely to recur," J.S. App. 28a, which is an independent reason for denying preliminary relief. *Contrast* Appellants' Br. 53.

preferred candidate could constitute a constitutional injury "if but only if that loss is attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*." J.S. App. 24a-25a.

Contrary to their position below, the plaintiffs now claim that the three-judge court erred in assigning them the burden of showing the redistricting affected election results. Instead, they insist that they need show only a "more-than-de-minimis burden" on their First Amendment rights. Appellants' Br. 54. But the plaintiffs do not explain what amount of vote dilution would satisfy that standard and "yet fall[] short of altering electoral outcomes." J.S. App. 23a. This failing is crucial here, where the Sixth District became newly competitive.

As the three-judge court concluded, the plaintiffs' reliance on so-called "predictive evidence" (like the Democratic Performance and Partisan Voting Indices), J.S. App. 26a, cannot satisfy their burden here. The court explained that this evidence was not "determinative of but-for causation," "given that Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations" and "[t]he surprising results of various elections in 2016," which "illustrate the limitations of even the most sophisticated predictive measures." J.S. App. 27a. Thus, it is a more than "plausible" conclusion, *Cooper*, 137 S. Ct. at 1465, that the plaintiffs likely cannot prove that

redistricting was the but-for cause of John Delaney's success in the Sixth District.

### B. The Burden-Shifting Framework of *Mt. Healthy v. Doyle* Does Not Apply to this Case.

The plaintiffs argue incorrectly that the court below should have shifted to the defendants the burden to disprove but-for causation under *Mt. Healthy City Board of Education v. Doyle*, 428 U.S. 274. Their argument not only conflicts with this Court's rationale in *Hartman*, it highlights the lack of fit between a traditional First Amendment retaliation claim and their claim of a partisan gerrymander.

In a traditional First Amendment retaliation case, the official action itself *is* the asserted injury, *see, e.g.*, *Mt. Healthy*, 428 U.S. at 276 (refusal to renew teacher's contract). But here the alleged official action is facially neutral legislation petitioned to referendum and approved by the voters, and the plaintiffs have alleged that their alleged vote dilution injury is a *consequence* of the official act. Thus here, as the plaintiffs themselves acknowledge, unlike in a traditional First Amendment retaliation case, to establish injury, a plaintiff must show that the facially neutral official act—the challenged map—"diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect." J.S. App. 104a; *see also* J.S. App. 25a (quoting ECF No. 191 at 13).

Because the plaintiffs cannot meet that burden, the three-judge court properly rejected application of *Mt. Healthy* to the plaintiffs' partisan gerrymandering claim. Under the burden-shifting framework set forth in *Mt. Healthy*, "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee)." *Hartman*, 547 U.S. at 260. As the three-judge court explained, "*Mt. Healthy* assumes an injury has occurred and focuses on questions of motive and intent." J.S. App. 24a. Unlike an official action that is inherently adverse, like firing, failure to promote, or cancelling a contract, in the redistricting context "the government's 'action' is only 'injurious' if it actually alters the outcome of an election (or otherwise works some tangible, measurable harm on the electorate)." *Id.* "[I]f an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." *Id.* Because the plaintiffs failed to demonstrate that the map caused them harm, they failed to show a constitutional injury. The three-judge court therefore rightly declined to shift the burden to the State to prove that, absent retaliatory animus, it would have adopted the same map.

The *Mt. Healthy* framework was developed to address a claim "in which two motives were said to be operative in" one employer's single "decision to fire an employee." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 359 (1995). In *Hartman*, this Court

reversed an appellate court's application of *Mt. Healthy* burden-shifting that required defendants to prove probable cause in a retaliatory prosecution case. 547 U.S. at 266 (reversing *Moore v. Hartman*, 388 F.3d 871, 879 (D.C. Cir. 2004)). The reasons this Court in *Hartman* found it necessary to depart from *Mt. Healthy* include at least three that apply here with equal if not greater force: (1) the problem of "particularly attenuated causation between . . . alleged retaliatory animus and the plaintiff's injury," involving "the animus of one person and the injurious action of another"; (2) lack of identity between defendants and the actors "who made the . . . decision that injured the plaintiff," because the latter "enjoy absolute immunity for their decisions"; and (3) the "presumption of regularity" accorded to those actors' decision-making. *Reichle v. Howards*, 566 U.S. 658, 667, 668, 669 (2012) (analyzing *Hartman*).

First, here, as in *Hartman*, where the plaintiff claimed investigators induced his prosecution in retaliation for speech, 547 U.S. at 252, "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is . . . more complex than it is in other retaliation cases," *id.* at 261. In fact, this case is decidedly more complex than the situation in *Hartman*. Here, "the causal connection required . . . is not merely between the retaliatory animus of one person and that person's own injurious action," or even "between the retaliatory animus of one person and the action of another," as was the case in *Hartman*. *Id.* at 262. Instead, the plaintiffs' claim presents the far more

complex and "particularly attenuated causation," *Reichle*, 547 U.S. at 667, between retaliatory *animus* attributed to multiple actors involved in the redistricting process, and the separate *actions* (plural) of the legislators who enacted the legislation and the more than 1.5 million voters who approved the legislation in the referendum, as well as, ultimately, the thousands of Sixth District voters who voted for congressional candidates.

Second, as in *Hartman*, and for similar reasons, the defendants sued here—the State Board of Elections Chair David McManus and its Administrator Linda Lamone—are not the actors alleged to have made the allegedly retaliatory decision. The named defendants are not alleged to have played any part in creating the redistricting plan they administer. Just as the defendants in *Hartman* did not include "the prosecutor, who is absolutely immune from liability for the decision to prosecute," 547 U.S. at 262, the defendants here do not include those involved in proposing and enacting the redistricting plan, most notably Governor O'Malley and the legislators, who are entitled to absolute legislative immunity from suit for their legislative decisions. *See Bogan*, 523 U.S. at 49; *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299, 300-01 (D. Md. 1992) (three-judge court) (holding that governor and legislators were entitled to absolute legislative immunity for their roles in redistricting).

Third, *Hartman* justified deviating from *Mt. Healthy* burden-shifting, in part, because of "an added legal obstacle in the longstanding presumption of

regularity accorded to prosecutorial decision making," 547 U.S. at 264, a presumption that "further weakened" the "causal connection between the defendant's animus and the prosecutor's decision," *Reichle*, 566 U.S. at 669. Here the challenged redistricting legislation is subject to another "longstanding presumption": the general "presumption of validity" accorded a State's legislation, absent "invidious discrimination" based on "racial criteria" or "other immutable human attributes," which this case does not involve. *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807, 808 (1969) (applying presumption of validity in equal protection challenge to a State's absentee voting law involving alleged infringement of "fundamental right" to vote). Though the presumption is rebuttable, in the context of this suit alleging that redistricting legislation was motivated by retaliatory animus, the presumption of validity finds reinforcement in this Court's reluctance to "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383. At a minimum, the presumption does, as in *Hartman*, "further weaken[ ]" the "causal connection" between alleged animus and the challenged decision, *Reichle*, 566 U.S. at 669, and renders the case unsuitable for routine application of *Mt. Healthy*.

This record lacks any evidence of retaliatory animus, but even if the plaintiffs could show that the map drawers' alleged retaliatory animus was the but-for cause of the particular map they drew, that would

account for only one step in the causal chain. The multiple links of the chain that would need to be connected through proof include, among others, the GRAC, the Governor, and the Legislature. To establish harm due to retaliation, the plaintiffs still would need to prove that the resulting redistricting plan was the but-for cause of the Sixth District's change from Republican to Democratic control. In the starkest possible contrast with *Mt. Healthy*'s employment context, completing the chain of causation here ultimately depends on the independent decisions of thousands of voters and the electoral circumstances that influenced their votes. No amount of animus-based line drawing could have compelled *unaffiliated* voters in the Sixth District to vote for the Democrat John Delaney in 2012; or compelled voters in Washington County to vote for the Democratic candidate John Delaney in 2012, after having consistently voted for the Republican in the prior ten elections; or compelled voters who voted for Republican Larry Hogan for Governor in 2014 to vote for John Delaney for Congress in the same election.

Notwithstanding the reasonableness of the three-judge court's reliance on *Hartman*'s guidance, the plaintiffs say that shifting the burden to defendants under *Mt. Healthy* "makes sense," because "it is the defendant who knows better (and is better situated to prove) the causes of his own conduct." Appellants' Br. 57. That suggestion *would* "make sense" in a typical retaliation case involving a single actor, but the challenged "conduct" here was undertaken not by a single map-drawer or Governor O'Malley or even the GRAC.

The redistricting law was enacted by the legislature and then approved by the electorate. The named defendants, who merely administer elections, are in no better position than the plaintiffs to "know[ ]" whether the legislators who enacted the redistricting plan and the more than 1.5 million voters who approved the map had an "alternate, lawful explanation" for doing so. *Id.*

### C. Other Grounds Support the Denial of Preliminary Injunctive Relief.

This Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *see Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) (citing *Thigpen*). There are three other reasons, argued below, why the plaintiffs are unlikely to succeed on the merits of their claims.

First, the plaintiffs are unlikely to prove that Maryland decision-makers harbored "vengeful" intent toward the plaintiffs for voting Republican in the past, *Hartman*, 547 U.S. at 256, or that the districting plan was passed to send a message to Republicans that they vote "at their peril," lest they be redistricted, *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1419 (2016). To the contrary, Maryland decision-makers met with Republican Congressmen to consider their views, J.A. 57-60; implemented constituents' suggestions regarding connections with Montgomery County and the I-270 corridor, *see* J.A. 403-04, 409, 418-19, 422-23;

rejected a map likely to produce eight Democratic seats, *see* J.A. 873-74, 938; and created a competitive Sixth District, J.A. 881. Governor O'Malley, who led the redistricting effort, explained that many decisions, including a decision "not to try to cross the Chesapeake Bay," J.A. 44, "the desire of the mayors," *id.* at 54-55, and the growth and development in the I-270 corridor, *id.* at 43, 52-53, factored into the map. Along with these concrete goals, Governor O'Malley harbored a "hope," J.A. 45, for Democratic success and considered it his role, as the elected head of the Maryland Democratic party, "to create a map that was more favorable for Democrats over the next ten years and not less favorable to them." J.A. 79. But a preference for competitive districts arising from a sense of responsibility to one's constituents, when held in conjunction with other nonpartisan goals, does not constitute retaliatory animus against voters of the opposite party.

Second, the plaintiffs cannot prove that alleged animus by decision-makers led to the vote dilution of which they now complain. Not all of the changes in the district's boundaries and attendant reassignment of populations resulted from an intention or purpose specific to the Sixth District. Some of the Sixth District's borders resulted from legislative choices to eliminate the Chesapeake Bay crossing in the First District and to confine the Fourth District to Prince George's County. If one considers only the interchange of population between the former Sixth District and the former Eighth District, there was a combined net change of 58,486 registered Republicans reapportioned out of

and registered Democrats reapportioned into the former Sixth District. J.A. 773. That number of net reassigned voters is smaller than the 64,608 votes that separated candidates Delaney and Bartlett in the 2012 election. *Id.*; J.A. 1026.

Third, the plaintiffs failed to prove that the redistricting plan constituted any direct burden on their representational rights, even a de minimis one. The right to " 'have an equally effective voice' in the election of representatives" does not bestow on any individual "an independent constitutional claim to representation" based on one's status as a group member, even if that group is composed exclusively of Bartlett voters. *Bolden*, 446 U.S. at 78 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). The plaintiffs cannot avoid this conclusion by claiming to assert individual rights.

Each plaintiff's individual vote for Congressman Bartlett had the weight of all other votes cast in Maryland in 2012, just as in 2002, because Maryland created equally populous districts. It is only when the plaintiffs' votes are aggregated with those of other Bartlett supporters or Republican voters that it becomes possible to assert that the *group's* votes have lost "strength" or been "diluted" in the current Sixth District compared to its predecessor.

But the plaintiffs offered none of the familiar evidence that usually accompanies claims of vote dilution, such as actual election results showing that Democrats and Republicans in the Sixth District are polarized in their voting habits. J.A. 768-71. Instead, the record

contains evidence of extensive crossover voting. *E.g.*, J.S. App. 20a-21a (Senator Cardin underperformed in the Sixth District while Governor Hogan over-performed as compared to statewide results). Similarly, nothing in the plaintiffs' showing considers the voting preferences of the 20.8% of registered voters who were affiliated with neither political party. J.S. App. 20a; J.A. 526-27.

Nor could the plaintiffs' allegations of chilling, Appellants' Br. 43, provide the extra factor. Those allegations consist largely of out-of-court statements of unidentified voters that are inadmissible hearsay, were not considered by the three-judge court, and were the subject of a pending unresolved objection. *See* J.S. App. 18a-21a. Moreover, voter-turnout statistics belie the plaintiffs' suggestion that Republican voters have been chilled from participating in the electoral process and, to the contrary, show the positive effects of a more competitive district. During the 2012 general election, the number of Republicans voting increased over the prior presidential election in all five counties formerly comprising the Sixth District (and the percentage of registered Republicans who voted increased in four of the five counties as well). J.A. 1059-60. Republican voter registration also increased in each of those counties every year from 2010 to 2016. J.A. 1054-58. The mere diminution of a group's voting strength as measured by electoral success, without more, is no constitutional burden. *Vieth*, 541 U.S. at 288 (explaining that the Constitution "nowhere says that farmers or urban dwellers, . . . Republicans or Democrats, must be

accorded political strength proportionate to their numbers").

The three-judge court did not err in finding "serious doubts about whether Plaintiffs' alleged injury is likely to recur." J.S. App. 27a. Those doubts have only crystallized with the passage of time. If the plaintiffs' inability to elect their preferred Republican candidate is unlikely to recur, there is no future harm to remedy and an injunction should not issue. *See Winter*, 555 U.S. at 22 (holding that an injunction is appropriate only where plaintiff is "likely to suffer irreparable harm before a decision on the merits can be rendered" (citation omitted)).

Three other considerations warrant affirming the lower court's denial of preliminary relief:

1. Denial of the requested relief was further warranted by the plaintiffs' own delay in bringing suit and even longer delay before seeking a preliminary injunction. *Fishman*, 429 U.S. at 1330. As in *Fishman*, the plaintiffs here "could have sued earlier" but "delayed unnecessarily in commencing this suit" to challenge a statute that was no longer "a new enactment" but one that had been "utilized . . . before" in a previous election. *Id.* In this case, the plaintiffs compounded the consequences of their delayed filing by waiting another 3½ years before requesting a preliminary injunction. Just as in *Fishman*, "an injunction at this time," after three elections under the 2011 plan and so near the beginning of the next election cycle, "would have a chaotic and disruptive effect upon the electoral process."

*Id.* These circumstances alone justify denial of the plaintiffs' request for preliminary relief.

2. The three-judge court also would have acted well within its discretion to deny the preliminary injunction on the basis that the balance of equities tipped in favor of the state defendants or that denial was in the public interest. *See Winter*, 555 U.S. at 20, 24, 32. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *King*, 173 S. Ct. at 3 (Roberts, C.J., in chambers) (citation omitted).

The 2011 redistricting plan was duly enacted and then approved overwhelmingly in a referendum vote, which provided a resounding affirmation of the public interest in maintaining the congressional map currently being challenged. J.A. 852.

3. Because of the plaintiffs' extraordinary delay, their requested preliminary injunction would have required that the State, over a two-month period and at considerable expense: (1) draw a new congressional plan, (2) pass the plan through the General Assembly in a special session, and (3) have it signed into law by the Governor. J.S. App. 31a. The three-judge court reasonably declined to enter a preliminary injunction when, "as a practical matter, the Court would have been unable to cure any constitutional ill in advance of the 2018 midterms even had it scheduled a trial at the earliest opportunity." J.S. App. 32a.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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